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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

JACKSON COUNTY BY AND THROUGH
ITS CHILD SUPPORT ENFORCEMENT
AGENCY **Ex rel.** ANNETTE JACKSON,

Petitioner,

v.

JOHN WESLEY SWAYNEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

DOES A STATE COURT HAVE SUBJECT MATTER JURISDICTION OVER PATERNITY ACTIONS REQUIRED OF THE STATE BY 42 USC 602, 42 USC 654, AND RELATED FEDERAL LAW AND REGULATIONS TO DETERMINE PATERNITY WHERE THE CHILD, MOTHER, AND RESPONDENT ARE MEMBERS OF A FEDERALLY RECOGNIZED INDIAN TRIBE RESIDING ON THE INDIAN RESERVATION?

PARTIES TO THE PROCEEDINGS

THE PARTIES TO THIS PROCEEDING ARE:

THE JACKSON COUNTY, NORTH CAROLINA CHILD SUPPORT ENFORCEMENT AGENCY, PETITIONER

ANNETTE JACKSON, AN ENROLLED MEMBER OF THE EASTERN BAND OF CHEROKEE INDIANS AND THE MOTHER OF KEVIN JACKSON, A MINOR WHO IS AN ENROLLED MEMBER OF THE EASTERN BAND OF CHEROKEE INDIANS

JOHN WESLEY SWAYNEY, RESPONDENT AN ENROLLED MEMBER OF THE EASTERN BAND OF THE CHEROKEE WHO IS ALLEGED TO BE THE PUTATIVE FATHER OF KEVIN JACKSON.

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JACKSON COUNTY BY AND THROUGH
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JOHN WESLEY SWAYNEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The State of North Carolina prays that a Writ of Certiorari issue to review the judgment of the North Carolina Supreme Court entered on February 3, 1987, which affirmed the trial courts finding that North Carolina State Courts lacked subject matter jurisdiction over a federally required paternity action against an Indian living on the Indian reservation.

OPINIONS AND JUDGMENT DELIVERED IN THE COURTS BELOW

The judgment of the Honorable John J. Snow, Jr., North Carolina District Court Judge for the 30th District in Jackson County No. 82-CvD-66 is not a reported judgment. (The judgment is reprinted in full in the appendix hereto) The Jackson County Child Support Enforcement Agency appealed to the North Carolina Court of Appeals. The North Carolina Court of Appeals upheld the judgment of the District Court at 75 N.C. App. 629: ____ S.E.2d ____ (1985) The Jackson County Child Support Enforcement Agency entered Notice of Appeal to the North Carolina Supreme Court on August 5, 1985. The North Carolina Supreme Court affirmed the portion of the opinion of the North Carolina Court of Appeals which found that the State Court lacked subject matter jurisdiction to determine paternity in a proceeding where the child, mother, and alleged putative father were Indians residing on the Indian reservation. The North Carolina Supreme Court reversed the portion of the Court of Appeals opinion holding that the State Court lacked subject matter jurisdiction to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support. The decision of the North Carolina Supreme Court is reported at 319 N.C. 52; ___ S.E.2d ___ (1987) (The decision of the North Carolina Supreme Court is reprinted in the appendix) Respondent filed a timely request for rehearing which was denied on April lO, 1987.

JURISDICTIONAL STATEMENT

A. Proceedings in the State Supreme Court.

The original opinion of the North Carolina Supreme Court was filed on February 3, 1987. denial of a petition for rehearing by respondent was entered on April lO, 1987.

B. Provisions which Confer jurisdiction upon this Court.

This petition is brought under the authority of 28 USC 1257(3) because:

1. the validity of 42 USC 602, 42 USC 654 and their implementing regulations is drawn in question.

2. the validity of Chapter llO, Article 9 of the North Carolina General Statutes is drawn into question on the ground of its being repugnant to the laws of the United States, particularly the body of federal Indian law created by the decisions of the United States Supreme Court.

3. a privilege of immunity from the general authority of the State Courts over it's citizens is claimed under the statutes of or authority exercised under the United States by virtue of the respondent's status as a reservation Indian.

Further, support for this petition is presented by Rule 17(b) of the Rules of the United States Supreme Court. Three State courts of last resort have considered this or similar questions of law and all have reached different conclusions. Compare

a. ***State ex rel. Department of Human Services v Jojola***, 99 N.M. 500, 660 P.2d 590 (1983) cert. denied 464 U.S. 8O3 (holding State Court.has subject matter jurisdiction over child support action against Indian by virtue of 42 USC 6O2)

b. ***McKenzie County Social Services Board v. V.G.*** 392 N.W.2d 399 (N.D. 1986) ***cert. denied*** U.S. Supreme Court No. 86-996, Fall 1986 (holding State Court does not have subject matter jurisdiction over child support action against Indian by virtue of authority of ***Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering***, P.C. 467 U.S. 138, 81 L.Ed.2d 113, lO4 S.Ct. 2267

(1984) and ***Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering***, P.C. 476 U.S. ____, 90 L.Ed.2d 881, 1O6 S.Ct. ___(1986)

c. ***Jackson County ex rel. Jackson v. Swayney***, 319 N.C. 52, ___ S.E.2d ___ (1987) (holding that the State has no subject matter jurisdiction over paternity determinations among Indians but has subject matter jurisdiction over establishment and enforcement of support where paternity is not an issue)

Finally, Article III, Section 2 of the United States Constitution provides the Supreme Court with appellate jurisdiction in all cases in law and equity arising under the laws of the United States. This article seems especially appropriate since the conflict in which the sovereign State of North Carolina finds itself embroiled is created by the conflict between 25 USC 2, 25 CFR 11.22, and 25 CFR 11.3O and 42 USC 602, 42 USC 654, 45 CFR 3O2.10(a), 45 CFR 303.5.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following statutory provisions are reprinted in full in the Statutory Appendix attached:

28 USC 1257
42 USC 602(a)(26) and (27)
42 USC 654
U.S. CONSTITUTION, ART. III, SEC. 2
25 USC 2
25 CFR 11.22
25 CFR 11.30
45 CFR 302.10(a)
45 CFR 303.5
N.C. GEN. STAT. 110-141
N.C. GEN. STAT. 11O-135
N.C. GEN. STAT. 11O-130
45 CFR 302.12

42 USC 6O3(h)
42 USC 6O4(d)

STATEMENT OF THE CASE

Petitioner is Jackson County Child Support Enforcement Agency, an agency operating the Child Support Enforcement Program under the supervision of the North Carolina Department of Human Resources in accordance with federal law pursuant to N.C. Gen. Stat. 110-141. Annette Jackson, an enrolled member Of the Eastern Band of Cherokees, made application for and received Aid for Dependent Children from Jackson County Department of Social Services at the offices of the petitioner located within the exterior boundaries of the reservation of the Eastern Band of Cherokee Indians. By operation of law under N.C. Gen. Stat. 110-135, the actions of Annette Jackson created a debt in the amount of said public assistance due and owing the State of North Carolina by the responsible parent of the child, Kevin Jackson. Annette Jackson alleged under oath that John Wesley Swayney was the biological father of Kevin Jackson. On April 2, 1982, Jackson County filed a complaint against respondent alleging defendant to be the father of Kevin Jackson and seeking to recover the debt owed the State. Kevin Jackson, Annette Jackson, and John Wesley Swayney are members of the Eastern Band of Cherokee Indians and all reside within the ext!rior boundaries of the reservation of the Eastern Band of Cherokee Indians. On July 16, 1984, the District court dismissed petitioner's complaint for lack of personal and subject matter jurisdiction.

Petitioner appealed to the North Carolina Court of Appeals. The Court of Appeals reversed the district court's finding of no personal jurisdiction but affirmed the finding of no subject matter jurisdiction. (printed in the appendix) Petitioner appealed to the North Carolina Supreme Court. The North Carolina Supreme Court concluded that State courts lack subject matter jurisdiction to determine paternity where the child, mother and respondent are members of the

Eastern Band of Cherokee residing on the reservation but do have subject matter jurisdiction to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support. (printed in the appendix) Petitioner files this petition for certorari to obtain review of the determination that state court jurisdiction over paternity actions required by federal law would unduly infringe on tribal self-governance.

Petitioner raised the issue of subject matter jurisdiction by State courts over paternity actions against reservation Indians being required by virtue of the statutory provisions of Title IV-D of the Social Security Act at all stages in the proceedings before the State courts of North Carolina.

The first raising of said issue was at oral argument on defendant's (now respondent) motion to dismiss on July 16, 1984. As oral argument was not recorded or reported, the first reference to said issues in the record was contained in plaintiff-appellant's (now petitioner) brief before the North Carolina Court of Appeals on pages 4 through 6. (printed in the appendix)

ARGUMENT ON REASONS FOR GRANTING THE WRIT

A. THIS MATTER INVOLVES AN IMFORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

This case is worthy of consideration by the United States Supreme Courts because the decision will set precedent for other federal programs administered by States within Indian reservations, including but not limited to, Medicaid, unemployment insurance, and aid for dependent children.

All federal "entitlement" programs with which this writer is familiar contain similar language requiring the state to operate the program equally throughout the State. All

federal "entitlement" programs require the State to take legal actions in certain instances, including but not limited to, judicial review of administrative hearings whose outcome is against the applicant, and civil actions against persons suspected of fraud and abuse. All of said federal laws and regulations fail to recognize the existence of "Indian country" within the state's exterior boundaries but upon which the state's authority to regulate the conduct of Indians may be questioned.

Additionally, as is plainly indicated by three petitions for certorari to the United States Supreme Court since 1984, all states which operate child support enforcement programs and contain federally recognized Indian reservations are tossed on the horns of the same dilemma.

The dilemma is presented entirely by the conflicting and competing laws and regulations created by the United States Congress, Courts, and federal administrative agencies.

Essentially, absent governing Acts of congress, the question has always been whether the State action infringed on the right of reservation Indians to make their own laws and be ruled by them. ***Williams v. Lee***, 358 US 217, 220, 3 L.Ed.2d 251, 254 (1959) The test set forth in ***Williams*** is principally applicable to situations involving a non-Indian party. ***McClanahan v. Arizona State Tax Commission***, 411 US 164, 179, 36 L.Ed.2d 129, 14O (1973) Under North Carolina law, the petitioner, Jackson County Child Support Enforcement Agency, is the real party in interest due to Mrs. Jackson's assignment of the right to child support by her acceptance of Aid for Dependent Children benefits. ***See Settle v. Beasley,*** 309 N.C. 616, 3O8 S.E.2d 288 (1983) Under North Carolina law the county in instituting any child support action acts to collect a debt owed the State and United States. ***See*** N.C. Gen. Stat. 110-130 and 110-135.

North Carolina has recognized it's duty with respect to child support enforcement under federal law. ***See*** N.C. Gen. Stat. 110-141. The applicant for Aid for Dependent Children

is required to assign her support rights to the state. 42 USC 6O2(a)(26). The State is required as a condition of federal financial participation in Aid for Dependent Children to operate Child Support Enforcement Program under federal law and regulation. 42 USC 602(a)(27). Said program is to be in ioperation in all political subdivisions of the State. 42 USC 654 Said program is to be in operation on a statewide basis in accordance with equitable standards for administration that are mandatory *throughout the State.* 45 CFR 3O2.10(a) (emphasis added) For all cases, referred to the Child Support Enforcement Program by Aid for Dependent Children Program, the Child Support Enforcement Agency must attempt to establish paternity by court order or legal process established *under State law*; or by acknowledgement if *under the State law* such acknowledgement has the same legal effect as court-ordered paternity. 45 CFR 303.5 (emphasis added) If the State of North Carolina delegates any of the functions of the child support enforcement program to the Cherokee Court of Indian Offenses, North Carolina is required to.secure compliance with the requirements of the State plan by the Cherokee Court of Indian Offenses or the officials of said court. 45 CFR 302.12 North Carolina has no ability to enforce such compliance against an entity created by the United States Department of Interior, Bureau of Indian Affairs pursuant to 25 CFR 11.1 through 25 CFR 11.74. The penalty for violation of the statutes and regulations concerning the Child Support Enforcement Program is loss of federal funding. 42 USC 6O3(h) and 604(d).

On the other hand, the United States Supreme Court has previously applied the infringement test to the question of State subject matter jurisdiction over questions of Indian parentage and ruled in favor of tribal self government. ***See Fisher v. District Court***, 424 U.S. 382, 47 L.Ed.2d 106 (1976) Questions of Indian parentage are often influential or determinative of tribal membership. ***See Cherokee Intermarriage Cases, 203 US 76 (1906)*** Certainly, the tribe has an interest in maintaining control of its own membership.

Further, support to the exclusive control of paternity actions by the tribe is given by 25 CFR 11.22 and 25 CFR 11.3O. The Court of Indian Offenses is given jurisdiction of all suits wherein the defendant is member of the tribe or tribes within their jurisdiction by 25 CFR 11.22. The Court of Indian Offenses is given jurisdiction of all suits brought to determine the paternity of a child and to obtain paternity of a child and to obtain a judgment for the support of the child by 25 CFR 11.30.

The State of North Carolina finds itself in the position of being required to pursue determinations of paternity under State law by federal law and regulations but a finding of a lack of subject matter jurisdiction to do so against reservation Indians based on federal Indian law.

B. THE WRIT OF CERTORARI SHOULD BE GRANTED BECAUSE THE COURTS OF LAST RESORT FOR THE STATES OF NORTH CAROLINA, NORTH DAKOTA, AND NEW MEXICO HAVE DECIDED THE FEDERAL QUESTION PRESENTED IN DIFFERENT AND CONFLICTING WAYS.

Three different state courts of last resort have all applied the infringement test first established by the United States Supreme Court in ***Williams v. Lee***, 358 US 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) to federally required child support and paternity actions and all three have reached different, separate, and conflicting results.

The first of these three decisions in ***State ex rel. Department of Human Services v. Jojola***, 99 N.M. 500, 660 P.2d 590 (1983) ***cert. denied*** 464 US 8O3. In ***Jojola,*** an Indian mother assigned her right to child support to the Department of Human Services at the time of her application for benefits. During said application, she alleged the Indian defendant was the father of her child. The New Mexico Supreme Court found that, due to the assignment, the action

was a non-Indian v. Indian action required by and conforming with state and federal law and regulations. The New Mexico Supreme Court concluded that the exercise of subject matter jurisdiction over the paternity and child support action filed by the Department of Human Services in State court did not infringe upon the right of reservation Indians to govern themselves as set forth in ***Williams v. Lee, supra***. The New Mexico Supreme Court rejected ***Jojola's*** argument that domestic relations were within the exclusive jurisdiction of the tribe.

The second of these three cases is ***McKenzie County Social Services Board, S.N.F., through Michon Sax as Guardian Ad Litem , and C.F. v. V.G.***, 392 N.W.2d 399 (N.D., 1986). ***cert. denied*** U.S. Supreme Court No. 86-996 (1986).

In ***V.G., id.***, an Indian mother assigned her right to child support to the McKenzie County Board of Social Services at the time of her application for benefits. During said application, she alleged that the Indian defendant was the father of her child. The North Dakota Supreme Court ruled that the action was between Indians despite the federally required assignment. The North Dakota Supreme Court concluded that the exercise of subject matter jurisdiction over the paternity and support action filed by McKenzie County in State Court did infringe upon the right of reservation Indians to govern themselves as set forth in ***Williams v. Lee, supra***. The North Dakota Supreme Court accepted ***V.G.'s*** argument that determination of parentage of a child of Indian tribal members is a matter that is intimately connected with the right of reservation Indians to make their own laws and be ruled by them.

The third of these three decisions is the case at bar, ***Jackson County by and through it's Child Support Enforcement Agency ex rel. Annette Jackson v. John Wesley Swayney,*** 319 N.C. 62, ___ N.E.2d ____ (1987).

In ***Swayney***, an Indian mother assigned her right to child support to Jackson County at the time of her application

for benefits. During her application, she alleged that the Indian defendant was the father of her child. The North Carolina Supreme Court found that, due to her assignment, the action was a non-Indian v. Indian action required by and conforming with state and federal law and regulations. The North Carolina Supreme Court concluded that the exercise of subject matter jurisdiction over the collection of support not involving a determination of paternity did not infringe upon the right of reservation Indians to govern themselves. The exercise of subject matter jurisdiction over the determination of paternity where the mother, child, and defendant are Indians residing on the reservation did infringe on the right of reservation Indians to govern themselves as set forth in ***Williams v. Lee, supra.*** North Carolina Supreme Court partially accepted and partially rejected ***Swayney's*** argument that the determination of paternity and support was within the exclusive jurisdiction of the tribal court by virtue of 25 CFR 11.30.

The State submits that no better example of the need for the application of Rule 17.1(b) of the Rules of the United States Supreme Court can be found than the conflicting results of the above listed three applications of the infringement test laid out in ***Williams v. Lee, supra.***

CONCLUSION

The North Carolina Supreme Court's decision presents an issue with is ripe for decision by the Supreme Court of the United States. Consideration of these issues of competing and conflicting federal law is of vital importance to the several States and is ultimately subject to resolution only by this Honorable Court. For all of the reasons, authorities, and arguments advanced herein, the State respectfully prays that a Writ of Certiorari should issue to review the judgment of the North Carolina Supreme Court herein.

Respectfully submitted,

LACY H. THORNBURG
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an Assistant Attorney General for the State of North Carolina, and that I have served copies of the foregoing **PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT** by depositing same in the United States mail at Asheville, North Carolina, first class postage prepaid, to:

Creighton W. Sossomon
Attorney for Respondent
Post Office Box 9
Highlands, North Carolina 28741

This the 8th of June, 1987

LACY H. THORNBURG
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Robert E. Cansler
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